SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 390

SCOTT M. LOFTIN AND JOHN W. MARTIN, AS TRUSTEES OF FLORIDA EAST COAST RAILWAY COMPANY,
Petitioners,

vs.

CHRISTINE DEAL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA AND BRIEF IN SUPPORT THEREOF.

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Counsel for Petitioners.

JOHN H. WAHL, JR.,
Of Counsel.

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vs.

CHRISTINE DEAL.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

The petition of Scott M. Loftin and John W. Martin, as Trustees of the Florida East Coast Railway Company for Writ of Certiorari to the Supreme Court of Florida to review the judgment entered by it affirming the judgment of the Circuit Court of Palm Beach County, Florida, in a cause therein lately pending wherein Christine Deal, the respondent, was plaintiff and the petitioners were defendants, alleges:

I. Summary Statement of the Matter.

The petitioners are the Trustees of the Florida East Coast Railway Company, duly appointed by the District

Court of the United States for the Southern District of Florida, in a re-organization proceeding therein pending under Section 77 of the Bankruptcy Act, by an order directing them to take charge of and operate the system of transportation of the Florida East Coast Railway Company.

The Florida East Coast Railway Company is a common carrier by railroad in interstate and intrastate commerce between Jacksonville, Florida and Miami, Florida.

On June 7, 1943 the respondent, Christine Deal, brought an action at law in the Circuit Court of Palm Beach County, Florida, against the Trustees, to recover damages for the death of her husband, alleged to have resulted from the negligent operation of a troop train, on March 29, 1943, when it struck a motor truck being operated by the respondent's husband, William Deal, at a grade crossing in the Town of Boynton in Palm Beach County, Florida.

The declaration contained four counts (R. 1) [1] but the trial judge withdrew Counts 2 and 4 from the consideration of the jury and submitted the case on the issues made by the First and Third Counts and the defendants' pleas of (1) not guilty [2], and (2) contributory negligence of the deceased (R. 8).

The First Count of the declaration alleged negligence in the operation of the train in general terms (R. 1). The Third Count charged negligent failure (a) to maintain certain automatic signal lights at the crossing in proper working order, and (b) to so maintain them that they would warn travelers approaching from the south (R. 4).

Both at the close of the plaintiff's case and at the close

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[1] All page references herein relate to the certified transcript.

[2] Under the Florida practice the plea of Not Guilty operates as a denial of both the alleged wrongful act and the damages claimed.

of all the evidence the defendants moved for a directed verdict. Their motion was denied (R. 35 and 120).

The case was submitted to a jury upon charges given at the request of the parties and by the court of its own motion. The jury returned a verdict of $10,000.00. The trial judge denied defendants' motion for a new trial and entered final judgment for the plaintiff (R. 143).

The defendants appealed to the Florida Supreme Court but the judgment was affirmed (R. 148).

Defendants applied to the Court for a rehearing (R. 152) which was denied on June 19, 1944 (R. 155).[3]

II. Jurisdictional Statement.

The statutory provision upon which it is contended that this Court has jurisdiction to review the judgment in question is Section 237 of the Judicial Code as amended (U. S. Code, 1940 Edition, Title 28, Chapter 9, § 344) wherein it is provided:

> "(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination * * * any cause wherein a final judgment or decree have been rendered or passed by the highest court of a state in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution * * * of the United States."

The date of the judgment of the Supreme Court of Florida sought to be reviewed is May 19, 1944 (R. 148).

On June 19, 1944 the Supreme Court of Florida stayed the execution and enforcement of its judgment to enable petitioners to apply for a writ of certiorari to this Court and withheld its mandate (R. 155).

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[3] The application for rehearing asserted, inter alia, the Federal question which is the basis for this petition.

The opinion of the Supreme Court of Florida affirming the judgment of the Circuit Court of Palm Beach County will be found on pages 148 to 152 of the certified copy of the record filed herein. The date on which this petition for a writ of certiorari and supporting brief were filed in the Supreme Court of the United States was August 24th, 1944.

III. Questions Presented.

The question presented by this application is:

WHERE A STATE COURT OF LAST RESORT ON AN APPEAL BY A RAILROAD FROM A JUDGMENT ENTERED AGAINST IT FOR DAMAGES GROWING OUT OF A GRADE CROSSING ACCIDENT FINDS AS A MATTER OF FACT THAT THE RAILROAD NOT ONLY EXERCISED ALL ORDINARY AND REASONABLE CARE AND CAUTION IN THE OPERATION OF ITS TRAIN BUT ALSO HAD DILIGENTLY TRIED TO MINIMIZE THE DANGER OF GRADE CROSSING ACCIDENTS BY THE MAINTENANCE OF AN ADEQUATE SYSTEM OF AUTOMATIC WARNING SIGNALS, BUT NONETHELESS AFFIRMS A JUDGMENT AGAINST IT, IS THERE A DENIAL OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION?

IV. Reasons Relied On for the Allowance of the Writ.

The facts as found and recited in the majority[4] opinion disclose that:

> "Deal was quite familiar with the intersection, as he had passed there continually for many years * * *. On the east side of the main track and north of Lake Street was a warning signal designed to flash alternate red lights on the approach of a train, and west of the crossing and south of the street was a device of the same kind. * * * There was a preponderance of evidence * * * that the whistle was blown repeatedly as the train neared the scene and that

[4] Three of the seven justices of the Florida Supreme Court dissented.

> the bell of the locomotive was ringing. When the engineer saw the truck perilously near the track he applied the emergency brakes and brought the train to a stop as quickly as he could without derailing it. * * * There was abundant proof, too, that the signal lights were flashing. * * * No one denied the story of a traveler who approached from the opposite direction * * *. He testified that the red signal light facing him on the west side of the track was functioning. He saw and heeded it and made a frantic effort to warn the deceased of the impending danger. * * * Obviously, the company had diligently tried to minimize that danger by the maintenance of an adequate signal system. The engineer attempted further to lessen the danger in this particular instance by sounding the whistle and ringing the bell, yet Deal went on the track, not heeding these sounds if he heard and not paying attention to the warning of the other traveler if he saw. * * *''

Such facts, affirmatively disclosing the exercise of a high degree of care and caution by appellants, are irreconcilable and at complete variance with the conclusion that "The whole picture leads to the belief that negligence was chargeable to both parties to the cause * * *." Such a conclusion denied the appellants the equal protection of the laws and deprives them of their property without due process of law in contravention of their rights under the Fourteenth Amendment to the Constitution of the United States.

The railroad admitted that the special troop train involved in this accident was going 65 miles an hour. There is not a scintilla of evidence of any other negligence in this case. On the contrary, it affirmatively shows that the railroad took every precaution to protect travelers on the highway from the inherent dangers of crossing accidents. The evidence established and the Supreme Court found

that the deceased was negligent in proceeding upon a familiar crossing without looking or listening or using any degree of care for his own safety.

The Florida Supreme Court has held, as have the courts in all other jurisdictions, we believe, that the speed of a train in and of itself is not negligence. Previous decisions to this effect were cited in the dissenting opinion:

Powell v. *Gary,* 146 Fla. 334, 200 So. 854;
Roberts v. *Powell,* 137 Fla. 159, 187 So. 766.

As the evidence showed the deceased's negligence affirmatively and likewise disclosed the exercise by the railroad not only of due care but, actually, an unusually high degree of care, the recovery of damages against the petitioners was a denial of due process of law and a denial of the equal protection of the laws.

In accordance with the rules of this Court, a concise memorandum is filed herein in support of this petition.

Wherefore, your petitioners pray that a writ of certiorari be issued to the Supreme Court of Florida commanding it to transmit the record of its judgment of May 19, 1944 affirming the decision of the Circuit Court of Palm Beach County, Florida, in the cause styled "Scott M. Loftin and John W. Martin, Co-Trustees of the Florida East Coast Railway Company, Appellants, vs. Christine Deal, Appellee" for review and determination herein.

Miami, Florida, this 24th day of August, 1944.

RUSSELL L. FRINK,
ROBERT H. ANDERSON,
Attorneys for Petitioners.

JOHN H. WAHL, JR.,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

As the result of a grade crossing fatality petitioners (as defendants below) were charged with negligence. They pleaded the general issue.

The Supreme Court of Florida on an appeal from judgment in favor of the plaintiff (respondent here) found facts specifically disclosing that the plea of "not guilty" had been sustained. Nevertheless, in the face of recited facts clearly absolving petitioners of any liability, the Florida Court affirmed the judgment. In doing so it infringed upon petitioners' constitutional rights.

The Fourteenth Amendment to the Constitution of the United States has its roots in the fundamental concept that all men are equal in the eyes of the law and are entitled to justice administered upon a fair and impartial basis. The construction and application of the Amendment by the courts leaves no doubt that it was designed to prevent deprivation of life, liberty or property by not only the executive and legislative branches of the Government but also, and with equal force, similar infringements by the judiciary.[5] It is likewise clear that this constitutional inhibition applies not only to wrongs patent but equally so to wrongs which though not so readily apparent are, nevertheless, by their concealment[6] certainly as vicious and probably more detrimental to our system of government.

Many corrections of patent wrongs appear in the printed reports and precedents for actions which approach from

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[5] "The prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities * * *" *Chicago, Burlington & Quincy R. Co.* v. *Chicago,* 166 U. S. 226, 233, 17 S. Ct. 581, 583, 41 L. ed. 979; *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. ed. 565.

[6] *Yick Wo* v. *Hopkins,* 118 U. S. 356, 6 S. Ct. 1064, 30 L. ed. 220.

that direction are voluminous. For example, the Amendment, in its prohibition against denying to any person "equal protection of the laws," extends to corporate as well as natural persons,[7] to resident aliens as well as natural citizens,[8] and to colored citizens as well as white citizens.[9] It provides against unequal taxation.[10] The subjection of the liberty and property of a defendant to a court, the judge of which has a direct, substantial pecuniary interest against him is a denial of due process under the Amendment.[11] When the state takes a person into custody for trial for crime, the Constitution of the United States compels the state to afford him protection while in confinement, the bringing of him into court, the assembling of the jury, the charge, the seclusion of the jury from outside interference, the return of the verdict, the passing of judgment, the freeing or condemning him according to the judgment, and, if found guilty, allowing him an appeal, suspending execution of sentence meanwhile.[12]

When a litigant invokes the Amendment for the correction of a concealed infringement (so characterized for lack of a better term), however, he finds himself in a land more or less barren of decided cases. But this should not be and is not a barrier to relief. As was said by the Court of Appeals of New York in *Kujek* v. *Goldman*, 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 A. S. R. 670:

> "While no precedent is cited for such an action, it does not follow that there is no remedy for the wrong, because

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[7] *Louis K. Liggett Co.* v. *Lee*, 288 U. S. 517, 53 S. Ct. 481, 77 L. ed. 929, 85 A. L. R. 699.

[8] *Terrace* v. *Thompson*, 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255.

[9] *Buchanan* v. *Warley*, 245 U. S. 60, 38 S. Ct. 16, 62 L. ed. 149.

[10] *Hopkins* v. *Southern California Telephone Co.*, 275 U. S. 393, 48 S. Ct. 180, 72 L. ed. 329.

[11] *Tumey* v. *State of Ohio*, 273 U. S. 510, 47 S. Ct. 437, 71 L. ed. 749.

[12] *Riggins* v. *U. S.*, 199 U. S. 547, 26 S. Ct. 147, 50 L. ed. 303.

> every form of action when brought for the first time must have been without a precedent to support it. Courts sometimes of necessity abandon their search for precedents and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there was no direct precedent for it, because there had never been an occasion to make one."

The approach of these petitioners is along the path of an appeal to elemental justice for correction of a wrong which is concealed, apparently without reported direct precedent, and yet as fundamental to petitioners' rights under the Constitution as it is important to the preservation of those principles of equal justice upon which our democratic concept of government depends for its principal foundation.

In Florida the liability of a railroad company for damages in a civil action is prescribed by statute.[13] It provides that such companies are liable for damage done to persons or property by the running of trains "unless the company shall make it appear that their agents exercised all ordinary care and diligence, the presumption in all cases being against the company." Under such a statute an alleged tortious act by the railroad company must be proved. This is to be accomplished, if at all, by no less convicing evidence than is required in the case of any other defendant.[14]

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[13] Sec. 768.05, Florida Statutes, 1941.

[14] "A state statute (Ga. Civ. Code, § 2780) declaring that a railroad company shall be liable for damages to person or property by the running of its trains, 'unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company,' which is construed by the courts of the state as permitting the presumption of negligence thereby created to be given the effect of evidence, to be weighed against opposing testimony, and to prevail unless such testimony is found by the jury to preponderate, is violative of the due process clause of the 14th Amend-

In a criminal action conviction is dependent upon an established measure of competent proof disclosing the ultimate facts necessary to establish guilt of the crime charged.[15] In a civil action a judgment for damages must likewise be squarely bottomed upon preponderant evidence of the negligent acts alleged, and as the established rules of evidence are applicable so likewise are the accepted judicial concepts of cause and effect.[16]

Upon this preliminary statement of fundamental law, petitioners contend that in the case at bar the Supreme Court of Florida has infringed upon their substantive rights under the Constitution and has deprived them of the equal protection of the laws.

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ment." *Western & A. R. Co.* v. *Henderson*, 279 U. S. 639, 49 S. Ct. 445, 73 L. ed 884.

* * *

"Such a question must be determined from the evidence as any other fact in the case is determined. The jury has no arbitrary power to disregard uncontradicted evidence and place the blame upon the railroad company for the alleged injury." *S. A. L. R. Co.* v. *Myrick*, 91 Fla. 918, 109 So. 193.

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[15] "Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition * * *. But alterations which do not increase the punishment nor change the ingredients of the offense *or the ultimate facts necessary to establish guilt* * * * relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure." *Hopt* v. *People of Utah*, 110 U. S. 574, 4 S. Ct. 202, 28 L. ed. 262.

[16] "(In order that damages may be recovered by any one so injured) *negligence of the railroad must have existed and must have been the proximate cause of the injury;* for, if the heedlessness and lack of prudence on the part of the party injured was the sole proximate cause of the injury, *he cannot recover however negligent the railroad company may otherwise have been.*" *S. A. L. R. Co.* v. *Smith*, 53 Fla. 375, 43 So. 235. See, also: *Florida C. & P. R. Co.* v. *Williams*, 37 Fla. 406, 20 So. 558; *S. A. L. R. Co.* v. *Myrick*, supra; *S. A. L. R. Co.* v. *Watson*, 94 Fla. 203, 113 So. 716; *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Brady* v. *Southern R. Co.*, 320 U. S. 476, 88 L. ed. 189.

In essence, the facts of the case are as simple as they are barren of the elements necessary to constitute actionable negligence. Petitioners operate a line of railroad engaged in intrastate and interstate commerce. At the town of Boynton Beach, Florida, the two principal grade crossings are protected by flashing automatic signals, motivated by electricity and set in operation when the electric circuit is closed by an approaching train. The installation of these automatic warning signals was considered necessary by petitioners because their railroad station constituted an obstruction to the view of motorists approaching the tracks.

Concerning this the Supreme Court of Florida in its opinion filed May 19, 1944, had the following to say:

> "Obviously the company had diligently tried to minimize (the) danger by the maintenance of an adequate signal system."

On March 29, 1943, at about 6 P. M., respondent's intestate, driving a truck, approached one of these protected crossings from the east. At the same time a troop train operated by petitioners was likewise nearing the crossing from the south. It was a through movement and not scheduled to stop at Boynton Beach. Its speed was approximately 65 miles per hour. On account of frequent use over a period of years deceased was entirely familiar with the physical situation and, as a matter of fact, had just concluded the delivery of a freight shipment to petitioners' station platform. As the train approached, it set the automatic flashing lights in operation. Confirming this the Supreme Court of Florida said:

> "There was abundant proof, too, that the signal lights were flashing."

In addition, the engineer in charge of the locomotive gave adequate warning of its approach. The Supreme Court of Florida said:

> "There was a preponderance of evidence however that the whistle was blown repeatedly as the train neared the scene and that the bell on the locomotive was ringing."

* * * * * * *

and

> "The engineer attempted further to lessen the danger in this particular instance by sounding the whistle and ringing the bell, * * *"

In addition to this wealth of warning, the Supreme Court of Florida recited the following fact:

> "No one denied the story of a traveler who approached (the crossing) from the opposite direction immediately before the mishap and who had an unobstructed view of the oncoming train, the truck, and the collision. He testified that the red signal light facing him on the west side of the track was functioning. He saw and heeded it *and made a frantic effort to warn the deceased of the impending danger.*"

Notwithstanding his thorough familiarity with the physical characteristics of the crossing and in spite of these warnings, the Court found that:

> "* * * deceased entered the danger zone, with which he was entirely familiar, heedless of the warnings being given by the train, the signal device, and the other traveler."

In the resulting collision, William Deal was instantly killed. Upon trial, the jury returned a verdict of $10,000 in favor of his widow, and final judgment thereon was affirmed by the Supreme Court of Florida.

In the case of *Chambers* v. *Florida*, 309 U. S. 227, 60 S. Ct. 472, 84 L. Ed. 716, this Court had occasion to review the judgment of the Supreme Court of Florida wherein the defendant had been convicted and sentenced to death upon a charge of murder.

In its decision in that case this Court invoked for Chambers the protection of the 14th Amendment. Its action in doing so was to correct what petitioners have characterized in this action as a "concealed infringement."

So far as the record was concerned, the State of Florida had properly indicted and arraigned Chambers, afforded him a public trial and the right of appeal from his conviction. Due process of law apparently characterized every step in the proceedings from his apprehension through affirmance of the judgment of the trial court by the Supreme Court of Florida.

But delving into the circumstances surrounding his conviction this Court exposed to the light of judicial review the fact that the sentence of death pronounced upon Chambers depended solely upon an alleged confession which had been obtained by methods reminiscent of Medieval (and present day Totalitarian) brutality and under conditions which bore no semblance to due process or equal protection of the laws.

That decision followed *Brown* v. *Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. ed. 682, and the two cases marked a wider extension of the scope of the 14th Amendment than had hitherto been enunciated by this Court. It was as far reaching as it was beneficent to those litigants whose substantive rights under the Constitution are threatened by incursions of those in authority. In effect, this Court said that a person charged with crime must be convicted, if at all, upon facts which are competent to support the allegation of criminality. It held that constitutional methods and judicially recognized measures of proof are essential

to a judgment of conviction and that a man's life and liberty are not to be taken away upon a verdict of guilty not supported by sufficient facts to warrant this conviction.

Applying the legal principles laid down in the Brown and Chambers cases to the action at bar is not difficult even though the transition be from the criminal aspect to the civil side.[17]

By statutory enactment these petitioners were liable to respondent if and only if they failed to make it appear that "their agents had exercised all ordinary care and diligence." By frequent decisions of the Supreme Court of Florida in which it followed the universally recognized judicial concept of cause and effect, even if some act or omission on their part failed to meet the test of "all ordinary care and reasonable diligence," nevertheless, that act or omission had to be proximate and not a remote cause.

The Supreme Court of Florida found as a matter of fact that petitioners had exercised diligence by installing automatic signals, which were in operation, and that their agents operating the train had certainly exercised all ordinary care.

> "The engineer attempted further to lessen the danger in this particular instance by sounding the whistle (repeatedly as the train neared the scene) and ringing the bell."

and

> "When the engineer saw the truck perilously near the track he applied the emergency brakes and brought the train to a stop as quickly as he could without derailing it."

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[17] "The standard of evidence necessary to send a case to the jury is the same in both civil and criminal cases." *U. S.* v. *Feinberg*, (C. C. A. 2), 140 Fed. (2) 592. Cf. *U. S.* v. *Andolschek*, (C. C. A. 2), 142 Fed. (2) 503.

Upon these admitted facts wherein lies actionable negligence under the statute? Three members of the Florida Supreme Court made the same query by their refusal to concur in the opinion of the other four.

If any answer was made it appears to be the conclusion of the majority that negligence was chargeable to petitioners "on account of the speed of the train at that particular point."

That reply, however, does not encompass sufficient facts to overcome either of the following:

First: Section 768.06, Florida Statutes, 1941, specifically denies recovery by one whose injuries, though caused by a railroad company, were "done by his consent or caused by his own negligence."

In its opinion the Florida Supreme Court said:

> "* * * yet Deal went on the track, not heeding these sounds if he heard and not paying attention to the warning of the other traveler, if he saw * * *"

and

> "* * * deceased entered the zone of danger, with which he was entirely familiar, heedless of the warnings being given by the train, the signal device, and the other traveler * * *"

A factual situation so described does nothing more nor less than invoke the statute above quoted. It would be difficult, if not impossible to conceive of a case wherein application of the maxim "volenti non fit injuria" would be more apt.

Second: The speed of the train had no proximate causal relation to the result.

Mere cursory consideration might lead to the conclusion that the speed of the train was a proximate cause upon one or all of three grounds: First, that the engineer might

have stopped his train but for the speed; second, that the truck driver might have escaped injury but for the severity of the impact caused by the momentum; and, third, that the collision might have been averted entirely if the speed of the train had been lower so that the truck could have got across the tracks and out of danger before the locomotive reached the crossing.

Mature reflection will demonstrate, however, that none of these propositions is legitimate.

1. *Inability to stop*

The facility with which most of us, including judges and jurymen, stop our automobiles has, perhaps, encouraged an erroneous impression on this subject as it relates to all moving objects. Because, by our own experience with automobiles, we calculate stopping distances in terms of feet, it is difficult to cast our thoughts, as a locomotive engineer must, in terms of the many hundreds of feet which even moderate train speeds require within which to stop. This is a physical fact which the Court knows and no person with reasonable intelligence would deny either the fact or his knowledge of it. A common sense corollary to this fact is the universally recognized principle that at highway crossings it is the automobile which is required to yield the right of way to the train. This rule obtains in Florida.[18] If this rule of law did not exist, transportation by rail with any degree of efficiency or dispatch would be an impossibility. An enginer required to operate his train at such a speed that he could always yield the right of way to motorists at grade crossings would be interminably delayed in reaching his destination.

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[18] *A. C. L. R. Co.* v. *Watkins*, 97 Fla. 350, 121 So. 95.

2. *Force of the impact*

By the same process of nontransposed reasoning, we are likewise unable adequately to comprehend the enormous difference between the destructive force of a relatively light automobile traveling at a comparatively slow speed and the crushing impact of a railroad train moving at a similar rate. The weight of an automobile is to pounds as the weight of a train is to tons and their relative potentials of destruction are at a similar ratio.

Thus it is that one who finds himself in the path of an oncoming train cannot expect the degree of his injuries to be in any proportion to the speed of the train. This is particularly true in this case because the evidence showed that the locomotive collided with the truck directly at the driver's seat and on his side. It can scarcely be concluded that in such a collision death would not have resulted if the train had been moving, for example, at 30 miles per hour.

3. *Escape ahead of the train*

This theory (tenuous at most) certainly cannot be advanced seriously here. The evidence disclosed without contradiction that Deal drove onto the tracks and stalled his engine. He might have escaped if he had jumped out of the truck when this happened. Instead, however, he was trying to save the truck (in disregard of his own safety) when the collision occurred. He was trying to back the truck off the tracks.

In short, there is no escape from the simple but conclusive proposition that the speed of this train was remote in its relation to the death of respondent's intestate.

The Supreme Court of Florida has several times enunciated the generally accepted rule that where a motorist goes heedlessly upon the tracks without looking or listen-

ing he cannot recover, his failure to look being the proximate cause and the mere speed of the train being a factor so remote as not to alter the rule.[19]

That principle is applicable to the instant case. The petitioners, realizing that their station building constituted an obstruction to view, installed the automatic signals so that their flashing lights in front of the motorist would eliminate the necessity for him to drive dangerously close to the tracks to see around the building. While they were not responsible for the presence of the traveler on the other side of the crossing, nevertheless, petitioners are as entitled to the advantage of his presence there and his "frantic effort to warn the deceased of the impending danger" as respondent is chargeable with her intestate's inexplicable failure to heed such warnings.

The locomotive engineer knew of the flashing lights, and to complement their warning he rang the bell and blew the whistle repeatedly as he neared the scene. Certainly he could not reasonably be expected to foresee that in complete and reckless disregard of all such warnings the truck driver would, nevertheless, venture upon the tracks.[20]

However lacking in direct precedent this petition may be, it is marked by the novelty of the situation wherein petitioners find themselves saddled with a judgment for $10,000.00 upon facts which so clearly absolved them of liability. The factual circumstances of the accident itself however, *are not* without a precedent and petitioners can best depend for judicial support of their contention upon

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[19] *Powell* et al. v. *Gary,* 146 Fla. 334, 200 So. 854, and cases cited therein. See, also, *Van Allen* v. *A. C. L. R. Co.,* (C. C. A. 5) 109 Fed. (2) 780.

[20] "It is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Milwaukee & St. P. R. Co.* v. *Kellogg,* supra.

the language of the Court of Appeals of Ohio in the case of *Shaffer* v. *New York Cent. R. Co.*, (1940) 66 Ohio App. 417, 34 N. E. 2d 792:

> "'* * * When the company had provided the signs, signals and warnings, it had at the crossing, did the exercise of ordinary care require it to so operate its train that it could be stopped before it got to the crossing if those in charge of it then saw something on the track there?
>
> "The last clear chance doctrine is not pleaded in the amended petition, nor is it claimed to be applicable in this case.
>
> "In their relation to the public, railroads serve a practical purpose,—the rapid transportation of persons and commodities. In this service speed is essential. Warning signs and signals such as existed at this time and place having been provided, those operating that train were warranted in assuming that the traveling public, having been informed of its approach, would yield to it the right of way over the crossing. If this is not true and such a train must keep its speed where it can be stopped in a few feet, the essential and practical purpose of railroads is lost.
>
> "The answer to this question is—No—and with this answer the judgment of the trial court is sustained on the lack of any evidence tending to prove negligence on the part of the defendant."

Conclusion.

The judgment in this case is for $10,000. That, in itself, is a sizable sum, but the principle of law as applied by the Supreme Court of Florida is so far reaching in its implications that these petitioners, as well as all other persons engaged in the business of operating railroads, are greatly endangered if the opinion of the Supreme Court of Florida is permitted to stand. If the railroad companies install automatic safeguards of modern design at grade crossings and in the operation of their trains afford motorists addi-

tional timely warnings by whistle and bell signals, and still can be held liable in damages, because a heedless driver goes blindly upon the tracks in the face of such warnings, then, as a practical matter, it becomes impossible for such a company ever adequately to defend itself in an action arising out of a railroad crossing accident regardless of what may be the circumstances. The courts constantly refer to "the conduct of an ordinarily cautious and prudent individual" as the index of what should be done in order to avoid a charge of negligence. In this case, aside from petitioners and their agents, whose actions have been characterized by the Supreme Court of Florida as diligent and careful, the only other person whose conduct meets the test is the *other* traveler at this crossing. He came up to it and in obedience to the automatic flashing lights, as well as the bell and whistle signals, stopped his automobile.[21] Thereafter seeing deceased in a position of imminent peril he made frantic efforts to warn him. These facts added to all of the others which obtain in this case constitute such an overwhelming indictment of the conduct of respondent's intestate that if she is entitled to damages for his death then no person injured in a crossing accident should be denied recovery.

The writ of certiorari should be granted.

Respectfully submitted,

RUSSELL L. FRINK,
ROBERT H. ANDERSON.

JOHN H. WAHL, JR.,
Of Counsel.

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[21] If William Deal had so acted there would be no occasion for this proceeding.

(24)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 390

SCOTT M. LOFTIN AND JOHN W. MARTIN, AS TRUSTEES OF FLORIDA EAST COAST RAILWAY COMPANY,
Petitioners,

vs.

CHRISTINE DEAL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

BRIEF OF RESPONDENT.

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SUPREME COURT OF THE UNITED STATES

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BRIEF OF RESPONDENT.

To the Honorable, the Supreme Court of the United States:

The Petition for Certiorari should be denied, because:

First: There is no federal question involved, and

Second: The attempt to inject a federal question in the case was made too late.

We shall present these two propositions in the reverse order of that stated above.

I.

The Attempt to Inject a Federal Question in the Case Was Made Too Late.

The first attempt to inject a federal question in this case was made in Petitioners application for rehearing in

the Supreme Court of Florida. (See pages 152-154 of Transcript of Record.) Up to this point there had been no suggestion of a federal question. If the question presented is a federal question (we do not agree that it is) it is because of the verdict of the jury and the judgment of the lower court—not because of the opinion of the Florida Supreme Court—hence the question should have been presented both in the trial court and in the Florida Supreme Court so that these courts could have passed on it. In fact, we submit that this was essential to jurisdiction here. The application for rehearing was denied without any observation (See page 155 of Transcript).

This Court has held on many occasions that a federal question was too late when first presented on application for re-hearing which was denied by the State Court without passing on the point. *Godchaux Co.* v. *Estopinal*, 251 U. S. 179, 64 L. Ed. 213, 40 S. C. R. 116; *Mergenthaler Linotype Co.* v. *Davis*, 251 U. S. 256, 64 L. Ed. 255, 40 S. C. R. 133; *Jelt Bros. Distilling Company* v. *Carrollton*, 252 U. S. 1, 64 L. Ed. 421, 40 S. C. R. 255, and other cases.

In *Corkran Oil, etc. Co.* v. *Arnaudet*, 199 U. S. 182, 50 L. Ed. 143, 26 S. C. R. 41, Mr. Chief Justice Fuller said, in passing on an identical situation, "but this came too late, unless the petition was entertained and the point passed on."

In *American Surety Company* v. *Baldwin*, 287 U. S. 156, 77 L. Ed. 231, 53 S. C. R. 98, 86 A. L. R. 298 (text pages 303, 304) the late Mr. Justice Brandeis said, in speaking of the federal question being raised for the first time in an application for re-hearing "In that Petition * * * *it urged for the first time that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The Petition was denied without opinion.* The federal claim there made cannot serve as the basis for review by this court. The conten-

tion that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection, had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment." (Italics ours.)

In the case here, the question, while basically going to the verdict and judgment of the trial court, was never raised until the Application for re-hearing. Therefore, if it presents a federal question, it comes too late, but

II.

There Is No Federal Question Involved.

Respondent urges that the record before this Court is wholly devoid of a Federal question, hence, there is no jurisdiction to entertain the petition for Writ of Certiorari.

The record discloses that the husband of respondent was killed in a railroad crossing accident in an incorporated city. The usual pleadings were filed, alleging negligence of the railroad company, the death of the deceased and the consequent damages to the plaintiff below. Pleas of not guilty and contributory negligence were filed by the defendant below, petitioner here. The trial resulted in a verdict of $10,000.00 for the plaintiff below from which an appeal was taken to the Supreme Court of Florida and there affirmed. A petition for re-hearing was filed by defendant below, and denied without observation.

The Comparative Negligence Statute of Florida (Section 768.06, Florida Statutes of 1941) and the Presumptive Negligence Statutes of Florida (Section 768.05, Florida Statutes of 1941) have been held not to offend against the Federal or State constitutional guarantees of equal pro-

tection of the law in the recent case of *Loftin* v. *Crowley, Inc.*, 8 So. (2nd) 909; 150 Fla. 836; 142 A. L. R. 626, and inferentially by this court in denying certiorari from that judgment, in the case of *Loftin, et al.*, v. *Crowley, Inc.*, 63 S. C. R. 60, 317 U. S. 661.

For the Court's convenience we here set forth the above statutes:

> "768.05 Liability of Railroad Company. A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employ and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.
>
> 768.06 Comparative Negligence. No person shall recover damages from a railroad company for injury to himself, or his property, where the same is done by his consent, or is caused by his own negligence. If the plaintiff and the agents of the company are both at fault, the former may recover, but the amount of recovery shall be such a proportion of the entire damages sustained, as the defendant's negligence bears to the combined negligence of both the plaintiff and the defendant."

Petitioners predicate their Petition upon inferences drawn from quoted portions of the opinion of the Florida Supreme Court (See pages 4 & 5, Petition for Writ and supporting brief). From that part of the opinion quoted this court would be led to believe that the Petitioners were free from negligence. In order that the court may not be misled we, too, quote from the same section of the opinion, but have supplied the portions deleted from petitioners quotation and are adding one paragraph which immediately follows. That portion of the opinion here quoted,

which appears in italics, is that portion which was omitted by petitioners:

"Deal was quite familiar with the intersection, as he had passed there continually for many years *while delivering his produce to the platform maintained by the railroad company for the use of its patrons. The physical characteristics of the locality are quite important in determining the merits of the appeal, so before we proceed further we will undertake to describe them using approximate dimensions and distances.*

"Beginning thirty feet from the south line of Lake Street, which the deceased was traveling when struck, and extending southerly for 225 feet and ten feet distant from the nearest rail of the northbound track was a platform four feet in height. It was triangular in shape, six feet in width at the point nearest the crossing, and thirty feet wide two hundred feet further south. Along the east side of the platform was a spur track, and immediately east of that a paved street which entered Lake Street at right angles. The platform was roofed, but was open except for two small enclosures used as offices. On the east side of the main track and north of Lake Street was a warning signal designed to flash alternate red lights upon the approach of a train, and west of the crossing and south of the street was a device of the same kind.

"Deal was seen on the platform shortly before the collision, and evidently he proceeded from there northerly, thence westerly to the crossing. Whether in his course he drove so close to the platform as not to be able to observe the lights facing that entrance to the intersection cannot be definitely determined from the testimony.

"Three circumstances seem not in dispute: the nature of the platform, the relative positions of adjacent tracks and streets, and the speed of the train, which was sixty-five miles per hour. Because of the size of the platform and its proximity to the main line, the street, and the crossing we think the conclusion may be logically drawn that there was such an obstruction of the view to the

south as to make the intersection extremely dangerous. It is clear that it was necessary for a vehicle to be almost upon the track—one witness testified that a car had to be within four feet of it— before the driver could see an oncoming northbound train. Of course, the consequences of getting in the path of a thousand tons, the weight of the train in question, of metal hurtling along at ninety-two feet a second are frightening. There was a preponderance of evidence, *however*, that the whistle was blown repeatedly as the train neared the scene and that the bell on the locomotive was ringing. When the engineer saw the truck perilously near the track he applied the emergency brakes and brought the train to a stop as quickly as he could without derailing it. *Only contradiction of the statements that the whistle and the bell were sounded was the testimony of one witness who said simply that he did not hear, which may have been attributable to the blustery day.* There was abundant proof, too, that the signal lights were flashing. *Uncontroverted was the evidence that they were so constructed as to become energized when a train came within three thousand feet of the crossing and that each device contained two lights with two filaments, so that both filaments in both lights would have to fail before the signal ceased to function, a remote possibility. More important, there was no contradiction of the testimony of an inspector who stated positively that a few days before the accident and the day afterward the apparatuses were tested and found working properly. There was no dispute whatever about the good condition of the surface of the crossing.* No one denied the story of a traveler who approached from the opposite direction *immediately before the mishap and who had an unobstructed view of the oncoming train, the truck, and the collision.* He testified that the red signal light facing him on the west side of the track was functioning. He saw and heeded it and made a frantic effort to warn the deceased of the impending danger.

"*In these circumstances we must determine whether the speed of the train at the place we have described*

and under the conditions we have related was negligence and whether the deceased made a contribution in negligence to his own death.

"The company had found it necessary to construct the platform and buildings the better to serve the public, and yet in that very effort an obstruction was created and congestion occasioned. There was sure to lurk some danger of collision between passing trains and vehicles hauling produce to the station. Obviously the company had diligently tried to minimize that danger by the maintenance of an adequate signal system. The engineer attempted further to lessen the danger in this particular instance by sounding the whistle and ringing the bell, yet Deal went on the track, not heeding these sounds if he heard and not paying attention to the warning of the other traveler if he saw.

"The whole picture leads us to believe that negligence was chargeable to both parties to the cause: to appellants on account of the speed of the train at that particular point; to appellee because deceased entered the danger zone, with which he was entirely familiar, heedless of the warnings being given by the train, the signal device, and the other traveler. The jury probably so found, invoking the rule of comparative negligence, Section 768.06, Florida Statutes, 1941, and F. S. A. as they were charged by the court to do if they found the circumstances justified that course. The amount of the verdict indicates that this was their purpose.

The question presented by Petitioners (page 4 of Petition and Supporting brief) was based on that part of the opinion quoted above in plain type—In view of what the court actually held as revealed by the italicized portion of the opinion, the question presented is misleading and should fall by its own weight. In its most favorabe light, it is wholly devoid of any Federal question.

Title 28, Section 344, U. S. C. A., and Section 237 Judicial Code as amended prescribed the jurisdiction of this

court with reference to the review of judgments of the Supreme Court of the several states by certiorari. Petitioners base their petition for Writ of Certiorari upon that portion of the above cited act reading:

> "* * * or where any title, right, privilege or immunity is specially set up or claimed by either party under the constitution or any treaty or statute of, or commission held, or authority exercised under, the United States * * * "

The record here is wholly devoid of any such "*title, right, privilege or immunity*" being "*specially set up or claimed*" by the Petitioners. (Italics supplied.)

Rule 38 of this Court indicates the character of reasons which will be considered in an application for certiorari to review judgments of a state court and we quote:

> "(a) Where a state court has decided a Federal question of substance, not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this Court."

We fail to find in the printed record before this court any Federal question of substance. Certainly no Federal question of substance was ever decided by either the trial court or the Supreme Court of Florida, for the simple reason that no such question was ever raised or involved. There is no intimation in the record of such question until the filing in the Supreme Court of Florida of Petitioners application for re-hearing which was denied without observation.

> "The bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay"—quoting from *New Orleans* v. *Waterworks Co.*, 142 U. S. 79,

12 S. C. R. 142, in the case of *Hamblin* v. *Western Land Company,* 147 U. S. 31, 13 S. C. R. 353, 37 L. Ed. 267.

"The rule is a salutary one in view of the different jurisdictions of the state courts and of this court. It leaves in both the full plentitude of their powers. It permits no evasion by the state court of the responsibility of determining the Federal question if necessary to be determined; it permits no assumption by this court of jurisdiction to review the decision of local questions. The sufficiency of the local question to sustain the judgment rendered, and the necessity for the determination of the Federal question necessarily we have to consider, but, as we said in Johnson vs. Risk (Tennessee 1890) 137 U. S. 300, 11 Supreme Court 111, 34 Law Ed. 683, 'Where a defense is distinctly made, resting on local statutes, we should not, in order to raise a Federal question, resort to critical conjecture as to the action of the court, in the disposition of such defenses' and, of course, the principle is applicable whether the question is presented as a ground of defense or a ground of action." *Adams* v. *Russell* (Michigan 1913), 229 M. S. 353; 33 S. C. R. 846; 57 L. Ed. 1294.

"Where neither the pleadings in the trial court, nor the assignment of errors, nor the opinion of the Supreme Court, contained any reference to the Federal question, there is color for a motion to dismiss." *East Tennessee V. & G. Ry. Co.* v. *Frazier* (Tenn. 1891), 11 Supreme Court 517, 519; 139 U. S. 288, 35 L. Ed. 196. (Headnote.)

III.

Conclusion.

The fundamental proposition presented may be stated as follows:

"Will the Supreme Court of the United States entertain a Petition for Writ of Certiorari where the sole question

presented is the sufficiency of the evidence in the trial court to sustain the verdict?''

If our position is sound, the Petition for Writ of Certiorari, is wholly without merit. In such event it is respectfully submitted that the respondent—revealed by the record to be a negro woman with ten minor children—has been damaged by the delay. She should be awarded damages as contemplated by Section 878, Title 28 U. S. C. A.; Sec. 344(c) Title 28 U. S. C. A. and Rule 30 of this court.

Respectfully submitted,

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